

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIMMY R. TRENT

Claimant

VS.

DRISCO, LLC.

Respondent

AND

COMMERCE & INDUSTRY INS. CO.

Insurance Carrier

Docket Nos. **1,036,368 &
1,036,369**

ORDER

Respondent and its insurance carrier request review of the November 13, 2007 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

It is undisputed that claimant suffered an injury to his right shoulder on April 17, 2007, and then again on July 30, 2007. The first accident was assigned Docket No. 1,036,368 and the second Docket No. 1,036,369. The dockets were consolidated for hearing. Although respondent admitted claimant suffered injury to his right shoulder it denied claimant suffered injury to his right knee or left ankle in either accident.

The Administrative Law Judge (ALJ) found claimant sustained injuries to his right shoulder, right knee and left ankle arising out of and in the course of employment with the respondent. The ALJ ordered respondent to provide claimant temporary total disability compensation and authorized medical treatment with Dr. Pat D. Do for claimant's right shoulder, right knee and left ankle.

The respondent requests review of whether claimant injured his right knee and left ankle due to the accidents and whether claimant is entitled to temporary total disability benefits and payment of medical expenses. Respondent argues claimant only suffered an injury to his right shoulder and therefore all benefits should be denied because respondent provided accommodated work within claimant's right shoulder restrictions.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a truck driver for respondent. On April 17, 2007, claimant was climbing down the side of the trailer after sweeping it out when his foot slipped and he fell. He first landed on his feet but then fell to the ground. Claimant testified he landed hard and felt like he had bruised his right shoulder, right knee and left ankle. He told his supervisor about the incident but continued to perform his normal duties.

On July 30, 2007, claimant was again climbing out of the trailer when he slipped and fell back down into the trailer bed landing on his right shoulder. As he continued to work his shoulder pain increased. Claimant contacted his supervisor that night and told him about the injury. He sought medical treatment for the shoulder the next day with Dr. Phillip S. Olsen.

Claimant was provided accommodated work on August 1 and 2 but he could not complete his workday on August 2 because of the onset of severe pain. Claimant testified:

Q. When did you first start having problems with your right knee and left ankle?

A. The 2nd. The 1st it was starting to hurt, the 2nd it was, but the 3rd I was in a wheelchair. I had to take a wheelchair to -- well, I went to work the 1st, made some phone calls.

Q. For August 1?

A. Yes, August 1. And then August 2, I went in and he had me standing up on a concrete floor counting uniforms and seeing what they had in the uniform bay and writing everything down. And then I went to therapy. And after I got done with therapy I came back and I finished up. And by then my knee and my ankle were hurting so bad from standing and moving uniforms that I told Joe that I was going to take the rest of the day off because I couldn't -- I just couldn't stay the rest of the day because I was hurting too bad.

Q. You told Joe what body parts were hurting on August 2?

A. The right knee and the left ankle from standing.¹

¹ P.H. Trans. 12-13.

Claimant testified he told Joe, his supervisor, that his knee and ankle were hurting due to standing on the concrete floor but he agreed that he did not tell him that he had injured his knee and ankle in the falls. He has not returned to work since August 2, 2007.

Claimant went to physical therapy the next day and was referred back to Dr. Olsen. Dr. Olsen scheduled claimant to see Dr. Do on August 6, 2007. Claimant testified he told Dr. Do's physician assistant about his shoulder, knee and ankle but was advised that only his shoulder could be treated. The doctor returned claimant to light-duty work with restrictions based solely upon the right shoulder.

Q. Did you attempt to return to work?

A. I went and told Joe what the deal was and that I didn't refuse the work but I needed a wheelchair. And I asked Joe at the time that day that if they could accommodate me with a wheelchair that I would come to work so that I could motivate around and not have to get up and sit down so much. And he said that he would make some phone calls and get back with me. And which he never did. And so I went home.

Q. Your employer offered you accommodated work for the restrictions of your right shoulder?

A. Yes. There a few days later Curtis called me and stated that they could offer light work and he basically -- I asked him then that if they could accommodate me with a wheelchair then I would try my best to get there and I would be there. And that's when he told me that I -- more or less they will just have to let me go because they couldn't accommodate the wheelchair. And I stated I didn't think you could fire me. And he said that he wanted me to quit. And I said, no, I haven't quit. I will refuse to quit. So they cleaned my truck out and somebody, I guess, brought it to my wife.²

Kurt L. Palmer, respondent's safety manager, testified claimant had some unreasonable requests such as purchasing an extra-wide wheelchair, helping him in and out of his vehicle and helping him up from a seated position. Mr. Palmer further testified that claimant was not terminated by respondent.

Joe Fortmeyer, respondent's operations manager and claimant's supervisor, testified claimant only reported that he had injured his right shoulder. Mr. Fortmeyer testified:

Q. During the time that Mr. Trent was working -- doing the inventorying of the uniforms, did Mr. Trent report to you any problems he was having with either his right knee or his left ankle?

² *Id.* 15-16.

A. No.

Q. Now, following that second day of accommodated work, were you involved with Kurt Palmer in making a decision to offer accommodated work to Mr. Trent based on Dr. Do's work restrictions?

A. Yes.

Q. And, basically, was Drisco in a position to offer accommodated work within the restrictions imposed by Dr. Do as of August 6, 2007? August 6, 2007?

A. Yes.³

On cross-examination, Mr. Fortmeyer testified he talked to claimant in his truck because he was not able to walk in to work due to knee and ankle problems. And Mr. Fortmeyer never asked claimant what had caused his knee and ankle problems. Respondent did not provide a wheelchair for claimant because Dr. Do's restrictions were just for claimant's shoulder and did not include a wheelchair.

This Board Member finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed claimant's testimony over the respondent's representative's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

The claimant has met his burden of proof to establish that he injured his ankle and knee in the fall at work and the pain worsened as he performed accommodated work standing on concrete as well as the additional strain getting up from a seated position without being able to use his arm to push himself up.

Respondent next argues the ALJ erred in awarding claimant medical treatment and temporary total disability benefits. The Board does not have jurisdiction to consider these issues on an appeal from a preliminary hearing.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁴ This includes review of the

³ *Id.* at 46-47.

⁴ K.S.A. 44-551.

preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁵

A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment and the payment of medical compensation. Likewise, the issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁶

An ALJ has the jurisdiction and authority to grant temporary total disability benefits and authorized medical treatment at a preliminary hearing. The ALJ did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge’s preliminary findings regarding medical treatment and payment of temporary total disability compensation. When the record reveals a lack of jurisdiction, the Board’s authority extends no further than to dismiss the action.⁷

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁷ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2006 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated November 13, 2007, finding claimant suffered accidental injury to his right shoulder, right knee and left ankle arising out of and in the course of his employment is affirmed. The respondent's appeal of the ordered temporary total disability compensation and medical treatment is dismissed.

IT IS SO ORDERED.

Dated this _____ day of January 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: James A. Cline, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge